(3) No. 96-1355

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARTHUR CALDERON, *Petitioner*,
v.
ANTHONY CORNELL BEAN, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should permit a procedural default based on a state court's discretionary procedural "guidelines", which have been determined to be arbitrarily and inconsistently applied, to bar federal habeas corpus review.[1]

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[1] The California Supreme Court's timeliness guidelines are set forth in Calderon v. United States District Court For the Eastern District Of California, 96 F.3d 1126, 1130 n. 3 (9th Cir. 1996), attached as Appendix B to the petition.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Anthony Cornell Bean (hereinafter "Bean"), respectfully requests that the Court deny the petition for writ of certiorari seeking review of the denial by the Ninth Circuit Court of Appeals of petitioner's petition for writ of mandamus which sought a direction to the district court to vacate its order denying petitioner's motion for summary dismissal.

The opinion of the Court of Appeals affirming the district court's order is reported at Calderon v. United States District Court For the Eastern District of California, 96 F.3d 1126 (9th Cir. 1996) [hereinafter cited as "Calderon"]. The district court's order that denied petitioner's motion for summary dismissal is unreported and is reproduced and attached as Appendix D to the petition.

STATEMENT OF THE CASE

On July 20, 1981, Bean was sentenced to death upon his conviction for the murder of Beth Schatz, and he was sentenced to state prison for a term of life without possibility of parole for the murder of Eileen Fox. On October 26, 1981, the California Supreme Court appointed counsel to represent Bean on his automatic appeal.[2] The judgment and sentence

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[2] Appointment orders entered did not refer to habeas corpus proceedings because habeas primarily was a post-affirmance remedy at that time. See generally, D. Fischer & R. Lynn, Appeals and Writs in Criminal Cases § 2.116 (C.E.B. 1982). After Bean's automatic appeal was denied, the California Supreme Court altered the responsibilities of appellate counsel to include "any related habeas proceedings."

were affirmed on appeal on September 19, 1988. People v. Bean, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988).

On June 6, 1989, the California Administrative Office of the Courts issued a news release entitled "Supreme Court Adopts Policies Regarding Cases Arising From Judgments of Death." A.O.C. News Release # 40 (June 6, 1989). Included among these "policies" was the Standards for Preparation and Filing of Habeas Corpus Petitions Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions (hereinafter "Standards"). Under the provisions of Standard 1, entitled "Timeliness Standards," the scope of appellate appointments was expanded, with apparent retroactive as well as prospective effect, to include the "duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." Bean's appellate counsel's appointment as counsel of record was, however, vacated by the California Supreme Court on April 4, 1990, at a time before any petition for writ of habeas corpus in state court on Bean's behalf was filed, and Bean's first and only state-court petition was filed after appointment of new counsel in federal court.

On July 26, 1990, the district court granted Bean's request for appointment of counsel to prosecute a federal habeas corpus proceeding on his behalf, and appointed present counsel, who had not represented Bean in state court proceedings. On July 18, 1991, counsel for Bean filed a federal petition for writ of habeas corpus in the district court. On July 30, 1991, the petitioner filed a motion for summary adjudication which alleged that the petition contained unexhausted claims.

See e.g., People v. Dent, No. S024645 (Cal. Jan. 20, 1995); People v. Sapp, No. S023628 (Cal. Jan. 19, 1995).

On September 26, 1991, the district court vacated petitioner's motion for summary adjudication, and remanded Bean to state court to exhaust state remedies on the ground that all but one of his claims was unexhausted. On October 31, 1991, federal counsel was appointed by the California Supreme Court for purposes of filing Bean's state habeas corpus petition.

On July 23, 1993, the California Supreme Court issued its decision in In re Clark, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993), in which a review of the "law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus" led the court to a simple, but important, conclusion: "no clear guidelines have emerged in our past cases." Id. at 763, 21 Cal.Rptr.2d at 517. The Clark court "attempted to explain and apply, among other things, the timeliness requirements the California Supreme Court had adopted in June 1989 for the filing of habeas petitions in capital cases." Calderon, supra, 96 F.3d at 1130.

Bean filed his first and only petition for writ of habeas corpus in the California Supreme Court on June 1, 1994. On June 6, 1994, the California Supreme Court requested that petitioner file an informal response to the petition pursuant to Rule 60 of the California Rules of Court, and that Bean file a reply to the informal response.

Petitioner grossly misrepresents the proceedings in this case when it states that the timing of Bean's filing of the state petition was "[w]ithout explanation." Petition, at 3, 6, 14, 19. Bean, in both the state petition and in the reply to petitioner's informal response provided extensive justifications for any delay in the filing of the state petition. Petitioner, in the petition for writ of mandamus filed in the Court of Appeals, made a similar misrepresentation, stating that Bean failed to justify the delay in filing the state petition. However, as the Court of Appeals opinion acknowledged: "In a subsequently filed erratum, the State noted that, contrary to what its petition

represents, Bean did in fact attempt to justify his delay." Calderon, supra, 96 F.3d at 1130 n. 5. Nevertheless, petitioner repeats the error here that it ultimately corrected below.

On February 23, 1995, the California Supreme Court denied Bean's state petition as follows:

> The petition for writ of habeas corpus is denied on the ground that it is untimely, does not identify those claims regarding which [Bean] lacked knowledge or advise when he became aware of the factual basis for those claims, and does not adequately explain the delay in investigating and presenting the claims. (In re Clark (1993) 5 Cal.4th 750, 774-775.)[3]

Appendix A to Petition.

In its order denying habeas relief, the California Supreme Court also found thirty-nine of Bean's claims to be procedurally barred on the grounds that they

> were or could have been, but were not, raised on appeal or were waived by failure to preserve them at trial. (In re Harris (1993) 5 Cal.4th 813, 826; In re Clark (1993) 5 Cal.4th 750, 765; In re Waltreus (1965) 62 Cal.2d 218, 225. See also People v. Bean (1988) 46 Cal.3d 919).

Id.

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[3] The California Supreme's order is attached to the petition as Exhibit A.

The Court did not, however, specify in its order which specific claims were not raised on appeal, which claims could have been raised on appeal, and which claims were waived for failure to preserve them at trial. Finally, the California Supreme Court addressed ten claims on their merits, and denied them for failing to state a prima facie case. In denying these claims, the California Supreme Court order cited to In re Clark, supra, 5 Cal.4th at 797-98, 21 Cal.Rptr.2d at 540-41. These cited pages of the Clark decision pertain to "exceptions to the procedural bar against successive or untimely petitions." Id. In Clark, the Court stated that the "fundamental miscarriage of justice" exception to procedural bar is applied where the Petition alleges:

> (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; [footnote omitted] (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; [footnote omitted] (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [footnote omitted] (4) that the petitioner was convicted or sentenced under an invalid statute.

Id.

These are precisely the kinds of claims that the California Supreme Court considered on the merits in Petitioner's case. It is therefore abundantly clear from the Order's citation to the exceptions enumerated in Clark, that whether or not the Court determined that the petition was

untimely, it applied the miscarriage of justice exception so as not to procedurally bar these ten claims.

Bean filed a federal petition for writ of habeas corpus on March 22, 1995. On July 21, 1995, petitioner filed a motion to dismiss the petition on the ground that the California Supreme Court's denial of the state habeas petition constituted a procedural bar to petitioner's claims. Oral argument was held on the motion on October 12, 1995. On November 17, 1995, the magistrate judge made findings that the state denial was not an adequate state bar, and recommended denial of the motion to dismiss. A copy of these findings is attached to the petition as Appendix C.

Petitioner complains in its Statement of the Case that the magistrate judge refused to apply Clark or Harris to Beans's state habeas petition "even though it was filed subsequent to both decisions, finding instead that neither case was the law at the time Bean should have raised his claims . . .". Petition for Writ of Certiorari, at 5. However, Petitioner fails to acknowledge that it conceded at oral argument before the magistrate judge and before the Court of Appeal that Bean's default, if any, would have occurred before Clark and Harris were decided. See Calderon, supra, 96 F.3d at 1130 & n. 4.

On March 29, 1996, the district court filed an order adopting the magistrate judge's findings in their entirety and denying petitioner's motion to dismiss.

An evidentiary hearing on several of petitioner's claims was held before the magistrate judge, beginning on May 20, 1996, and concluding on May 30, 1996.[4]

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[4] This fact is omitted from petitioner's Statement of the Case. The same omission was corrected in petitioner's Erratum filed in connection with the writ proceedings in this case.

On July 18, 1996, petitioner filed a petition for writ of mandate and/or prohibition in the Ninth Circuit Court of Appeals seeking an order directing the district court to vacate its order denying the petitioner's motion for summary dismissal. Petitioner did not seek review of the district court's order by interlocutory appeal in March when the district court acted to deny the motion, instead waiting until after the evidentiary hearing concluded in May to file its petition for writ of mandate and/or prohibition.

In an opinion filed on September 20, 1996, the Court of Appeals denied the mandamus petition. Calderon, supra, 96 F.3d 1126. On November 26, 1996, petitioner's petition for rehearing was denied.

In its Statement of the Case, petitioner ignores significant developments in this case which render a granting of certiorari in this case virtually moot. On January 23, 1997, the magistrate judge issued Findings and Recommendations with regard to the disposition of Bean's habeas corpus petition. The magistrate recommended the denial of relief with regard to Bean's guilt phase claims, but recommended the granting of relief with regard to two of Bean's penalty phase claims: Ineffective Assistance of Counsel and Bailiff/Juror Misconduct. Objections to the magistrate's findings and recommendations have been filed by the parties, and the case is pending before the district court judge. Petitioner also fails to note that the two claims on which the magistrate has granted relief were not procedurally defaulted by the California Supreme Court, but were two of the ten claims, discussed above, that the Court denied on the merits under an exception to its default rules. Thus, assuming arguendo that the California Supreme Court's procedural bars are found to be adequate and independent, such a ruling likely will have no impact on the ultimate disposition of Bean's claims.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court of Appeals properly determined that the state court's invocation of its timeliness "policies" to deny Bean's first and only petition was "inadequate" to bar federal court review. The timeliness policies of the California Supreme Court are impermissibly vague, entirely discretionary, and they are applied arbitrarily and haphazardly. Under long-standing doctrine of this Court, each of these reasons, considered individually, compels the conclusion that Bean is not barred from federal habeas corpus review of his claims.

Petitioner resorts to a distortion of the record in this case and a misrepresentation of federal and California law in its attempt to rescue the state's court's procedural default that was applied to Bean's state petition. First, petitioner repeatedly claims that Bean failed to justify any delay in filing the state petition, whereas the Court of Appeals recognizes that, "Bean did in fact attempt to justify his delay." Calderon, supra, 96 F.3d at 1130 n. 5. Petitioner also argues that the Ninth Circuit erroneously determined that the default at issue occurred prior to Clark. However, as the Court of Appeal correctly notes, petitioner conceded this point before the district court. Id. at 1130 & n. 4.

Petitioner is seeking review of the denial of a petition for writ of mandate and/or prohibition. Petitioner fails to acknowledge that the magistrate judge has already recommended the denial of relief on all of the claims which were denied on procedural grounds by the California Supreme Court and recommended the granting of relief on two claims which the California Supreme Court denied on the merits under its own exceptions to procedural default. Given the procedural posture of this case, it makes little sense for this Court to intervene at this stage of the proceedings because allowing the case to proceed to its final disposition below may

render petitioner's contentions moot. If the magistrate judge's recommendation to deny relief on the merits of all of the otherwise procedurally barred claims is adopted by the district court judge and affirmed by the Court of Appeals, there will be no issue with regard to procedurally defaulted claims since those claims would all have been denied.

Furthermore, petitioner's reliance on Ninth Circuit authority for the principle that there is a conflict within the Ninth Circuit is not only meritless but is not a basis upon which this Court ordinarily grants certiorari. In addition, petitioner's attempt to argue the consistency of the California Supreme Court's pre-Clark timeliness requirements is unsupported and contrary to the empirical data considered by the court below.

Finally, petitioner's "preemption" formulation of the doctrine for habeas corpus would render it a virtual nullity and upset this Court's carefully constructed balance of comity by allowing even the most arbitrary and haphazardly applied state procedural rules to bar federal court review.

1. The Court of Appeals Opinion is Consistent with this Court's Precedent as well as the Precedent of the Ninth Circuit and Other Federal Circuits

Under the adequate and independent state ground doctrine, this Court has no jurisdiction on direct review of a state court decision resolving federal questions if the judgment rests on a state law ground that is "independent" of the federal question and "adequate" to support the judgment. See e.g., Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872).

The procedural default doctrine governing federal habeas corpus cases is derived from this doctrine, see Wainwright v. Sykes, 433 U.S. 72 (1977); Coleman v.

Thompson, 501 U.S. 722 (1991), and is applied in the same fashion, Harris v. Reed, 489 U.S. 255 (1989), with one important difference. "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." Coleman v. Thompson, supra, 501 U.S. at 730. In the context of habeas corpus, the application of the independent and adequate state ground doctrine is jurisprudential and "grounded in concerns of comity and federalism." Id. at 730-31; Wainwright v. Sykes, supra, 433 U.S. at 83. Thus, the habeas corpus decisions of this Court repeatedly emphasize that a state procedural default will bar federal habeas corpus relief only where the state ground for decision is "adequate," see, e.g., Harris v. Reed, supra, 489 U.S. at 261-62; Coleman v. Thompson, 501 U.S. at 736 ("federal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds"), and cite without hesitation direct review cases setting forth criteria for judging adequacy. See, e.g., Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989) (upholding state rule where state court faithfully applied rule with only few exceptions); Harris v. Reed, supra, 489 U.S. at 261 n.6 (expressly incorporating the Johnson v. Mississippi, 486 U.S. 578 (1988), "even-handed application" test of adequacy that was applied by the Ninth Circuit in the instant case.).

In denying petitioner's mandamus petition, the Court of Appeals predicated its decision on this Court's jurisprudence. The Court of Appeals stated that for a procedural bar to apply, "'a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.'" Calderon, supra, 96 F.3d at 1129, quoting Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994), citing Ford v. Georgia, 498 U.S. 411, 424 (1991)("an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly

established and regularly followed' by the time as of which it is to be applied")(other citations omitted). The Court of Appeals explained that "'it is grossly unfair -- and serves none of the purposes of respect for procedural rules -- to forfeit an individual's constitutional claim because he failed to follow a rule that 'was not firmly established at the time in question.'" Id. (quoting English v. United States, 42 F.3d 473, 478 (9th Cir. 1994), quoting Ford, supra, 498 U.S. at 425). The court below also cited Johnson v. Mississippi, 486 U.S. 578, 587 (1988) for the proposition that "a state procedural ground is not adequate unless the procedural rule is strictly or regularly followed." Calderon, supra, 96 F.3d at 1129 n. 2.

It is therefore without question that the Court of Appeals' analysis of the state procedural bar at issue in this case was grounded in well-established precedent. Nevertheless, petitioner argues that the Court of Appeals decision in this case conflicts with and misapplies Ninth Circuit precedent, and cites one Ninth Circuit case to support this contention: Woratzeck v. Stewart, 97 F.3d 329 (9th Cir. 1996). Given that Woratzeck does not involve state procedural default doctrine, but rather addresses the application of an unconstitutionally vague aggravating factor, it is unclear how this case is relevant or how the Ninth Circuit's decision in the instant case may conflict with it.

Further, the Court of Appeals relied in this case on its previous holding in Morales v. Calderon, 85 F.3d 1387 (9th Cir.), cert. denied, __ U.S. __, 117 S.Ct. 500 (1996). In Morales, the Court reviewed undisputed empirical data regarding the California Supreme Court's treatment of habeas corpus petitions and concluded that there was "so much variation in application of California's timeliness requirements before Clark that we conclude that no discernible clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal." Id. at 1391 (quoted in Calderon, supra, 96 F.3d at 1130).

Far from being in conflict, the Ninth Circuit has been unwavering in its analysis and application of procedural default doctrine with respect to California procedural rules. See e.g., Hayes v. Calderon, 103 F.3d 72 (9th Cir. 1996); Morales v. Calderon, supra; Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied __ U.S. __, 115 S. Ct. 1175 (1995).[5]

Notably absent from petitioner's analysis is that every federal circuit has held that in a habeas corpus proceeding only those state rules that are consistently enforced are adequate to support a finding of procedural default. See e.g., Breest v. Perrin, 655 F.2d 1, 3 (1st Cir.), cert. denied, 454 U.S. 1059 (1981); Wedra v. LeFevre, 988 F.2d 334, 340 (2d Cir. 1993); Reynolds v. Ellingsworth, 843 F.2d 712, 719 (3d Cir.), cert. denied, 488 U.S. 960 (1988); Smith v. Dixon, 14 F.3d 956, 972 (4th Cir.), cert. denied, __ U.S. __, 115 S. Ct. 129 (1994); Hill v. Black, 932 F.2d 369, 373 (5th Cir. 1991); Warner v. United States, 975 F.2d 1207, 1213 (6th Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 1314 (1993); Rosa v. Peters, 36 F.3d 625, 633 (7th Cir. 1994); Grubbs v. Delo, 948 F.2d 1459, 1462-1463 (8th Cir. 1991), cert. denied, __ U.S. __, 113 S. Ct. 109 (1992); Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert. denied, __ U.S. __, 115 S. Ct. 1175 (1995); Klein v. Neal, 45 F.3d 1395, 1398 (10th Cir. 1995); Cochran v. Herring, 43 F.3d 1404, 1408 (11th Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 776 (1996). In fact, no circuit ever has rejected consistency of application as a test of adequacy.

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[5] In any event, even if such a conflict existed within the Ninth Circuit that would not provide appropriate grounds for the granting of certiorari. United States Supreme Court Rule 10.1, cited by petitioner, pertains to conflicts between a federal court of appeal and other circuit courts -- not between two cases within the same circuit.

2. California's Timeliness Rules Were Not Consistently Applied Prior to Clark

Petitioner relies solely on the California Supreme Court's decision in Clark to support its contention that the timeliness procedural bar has been consistently applied. According to petitioner, then, as long as the California Supreme Court fails to state that it has been inconsistent in its application of a procedural bar, federal courts are not permitted to question the adequacy of the bar on the basis of inconsistent application. Thus, without any analysis or citation to any empirical evidence, petitioner merely asserts that application of the timeliness bar was not "infrequently, unexpectedly, or freakishly applied . . ." Petition, at 14.

However, as discussed above, in Morales the Appeals Court analyzed 35 habeas petitions filed three years or more after affirmance on direct appeal, and concluded that there was "so much variation in application of California's timeliness requirements before Clark that . . . no discernable clear rule then existed for petitions filed more than 90 days after the due date of the reply brief on direct appeal." Morales v. Calderon, supra, 85 F.3d at 1391. As the Court stated:

> It is theoretically possible, we suppose, to reconcile and explain all of the California Supreme Court decisions entertaining on the merits or rejecting as untimely petitions that are three or more years old. Those divergent decisions may indeed represent consistent exercises of discretion rather than random applications of or exceptions to the timeliness rule. But we have no way of knowing whether that is the case. The California Supreme Court's denials of habeas petitions that Morales relies upon were accomplished by brief minute

> entries in what has been described as "post-card denial." We can discern no apparent relationship between the time of delay and the findings concerning timeliness. Nor could Morales be expected to do so.

Id. at 1392. The Court in Morales also noted that two district courts in the Circuit reached the same conclusion regarding the "standardless" and "ad hoc" nature of the timeliness bar. See Karis v. Vasquez, 828 F.Supp. 1449, 1462-1463 (E.D.Cal. 1993); Odle v. Calderon, 884 F.Supp. 1404, 1413-14 (N.D.Cal. 1995).

3. Petitioner Conceded Below That The Default, If Any, That Occurred in This Case Was Pre-Clark

Petitioner contends that the Court of Appeals' holding that the purported default in this case occurred prior to Clark is in error. Remarkably, petitioner fails to acknowledge that it conceded this issue below. As the Court of Appeals held, "There is no dispute that Bean's default, if any, would have occurred before Clark was decided. The State conceded as much before the district court [footnote omitted], and does not argue otherwise here. Calderon, supra, 96 F.3d at 1130; see id. at 1130 n. 4. Petitioner also conceded below that retroactive application of a new rule would be inappropriate. Id. at 1130 n.4.

It is clear from a review of the procedural history of Bean's state proceedings and of California's timeliness rules that the period of time when Bean could have avoided the alleged default occurred prior to the California Supreme Court's 1993 decision in Clark, at a time when the rules were unclear and inconsistently applied. See Ford v. Georgia, 498 U.S. 411, 423-25 (1991).

Bean's appellate counsel was appointed on October 26, 1981. Bean's conviction and death sentence were affirmed on direct appeal on September 19, 1988. People v. Bean, 46 Cal.3d 919, 251 Cal.Rptr. 467 (1988). Bean's appellate counsel never filed a state habeas petition on Bean's behalf. On June 6, 1989, after Bean's case was affirmed on direct appeal and while his certiorari petition was pending before the United States Supreme Court, the California Supreme Court issued its Standards, which purported to impose upon "[a]ppellate counsel in capital cases . . . a duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." Standards 1-1.

Prior to the promulgation of the Standards and, therefore, during the pendency of Bean's appeal, counsel was under a duty to present promptly those habeas corpus claims of which he or she had actual knowledge and to justify any "substantial delay" between the time when counsel became aware of the factual and legal bases of the claim and the filing of the petition. In re Stankewitz, 40 Cal.3d 391, 396 n.1, 220 Cal.Rptr. 382, 384 n.1 (1985). Counsel did not, however, have any "express obligation . . . to investigate possible bases for habeas corpus." In re Clark, supra, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 531. The magistrate judge in this case correctly noted that California case law prior to the Standards "provided little guidance as to just what constituted undue delay or what would excuse a finding of undue delay." Findings and Recommendations, at 6, attached to Petition as Appendix C. See also Morales v. Calderon, supra, 85 F.3d at 1390. In Stankewitz, supra, the California Supreme Court stated that a petitioner must "point to particular circumstances sufficient to justify substantial delay," but did not define or explain how much delay was "substantial" or what circumstance would be sufficient to justify it. In re Stankewitz, supra, 40 Cal.3d at 396 n.1, 220 Cal.Rptr. at 384 n.1.

The Standards simply provided that habeas corpus claims must be investigated and presented "without substantial delay." Standards 1-1. In their original form, the Standards also provided that petitions filed within 60 days of the appellate reply brief presumptively suffer from no substantial delay.[6] Standards 1-1.2. Those petitioners who did not file a petition within the presumptively timely period following the reply brief could establish an absence of substantial delay by providing facts showing the petition was filed within a "reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim . . . ". Standards 1-1.2. Alternatively, petitioner could allege specific facts "showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 [the date of finality of In re Stankewitz] . . . the petition was filed within a reasonable time after that date." Standards, 1-1.3.

In July 1993, while petitioner was in the process of exhausting state remedies, the California Supreme Court issued its opinion in In re Clark, supra, which purported to clarify and explain its requirements under the Standards. See Morales v. Calderon, supra, 85 F.3d at 1391. In Clark, the California Supreme Court acknowledged that, under the Standards, the reasonableness of any asserted delay was assessed from the date counsel or petitioner actually "became aware of information indicating a factual basis for the claim." In re Clark, supra, 5 Cal. 4th at 785, 21 CalRptr.2d at 532. The Court stated that an affirmative duty of "diligence in discovering both the factual and legal bases for habeas corpus

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[6] A September 1990 amendment increased this period from 60 to 90 days. In any event, petitioner's reply brief on direct appeal had been filed well before the Standards went into effect.

claims" was intended in promulgating the Standards. Id. at 785 n.21, 21 Cal.Rptr.2d at 532 n.21. To dispel the obvious confusion created by the Standards, the Court modified the wording to reflect the Court's original intent. Id. Consequently, after the Clark decision, "undue delay" was to be measured from the time counsel should have been aware of a ground for relief as opposed to when counsel actually became aware. Knowledge of a claim was said to exist when counsel was in possession of facts sufficient to plead a prima facie case.

Clearly the imposition of an affirmative duty on appellate counsel to investigate habeas corpus claims established in Clark was not the rule during the twelve years between the commencement of Bean's appeal and the Clark decision, or in the five years between the time of the affirmance of Bean's conviction and Clark. Thus, Bean had no opportunity to comply with the post-Clark Standards. Furthermore, Bean had no opportunity to comply with the standard that attached a presumption of timeliness to the filing of a petition within 90 days after the reply brief because that standard was not adopted until more than 90 days after his reply brief was filed.

Bean alleged in his state pleadings that the state petition was filed promptly after obtaining a factual and legal basis for the claims in compliance with In re Stankewitz, supra, 40 Cal.3d at 396 n.1, 220 Cal.Rptr. at 384, and the pre-Clark Standards, and provided several reasonable explanations for the failure to file the petition earlier. Significantly, petitioner does not dispute before this Court or in the court below that Bean filed the state petition within a reasonable time after discovering the factual and legal basis of his claims, but instead argues that Bean failed to explain the reasons for the delay in filing. Again, petitioner acknowledged in an erratum to its mandamus petition, but not here, that Bean did offer such an explanation. Calderon, supra.

The California Supreme Court's order denying Bean's petition as untimely does not clarify what period of time it considered in determining that there was substantial delay. The district court adopted the magistrate judge's findings that although Bean filed the state petition after Clark, the time petitioner should have raised the claims in order to escape the asserted bar was in the pre-Clark period. Findings and Recommendations, at 8, 11, attached to Petition as Appendix C. Petitioner agreed that, for purposes of analyzing the procedural bar, this is a pre-Clark case. See Calderon, supra, 96 F.3d at 1130 & n.4.

Since the procedural bar was not firmly established or consistently applied prior to Clark, it is not adequate to bar federal review, and the district court's ruling in this case was not clearly erroneous. Thus, the Court of Appeals appropriately denied the petition for writ of mandamus..

4. Federalism and Comity Do Not Permit Arbitrary and Haphazardly Applied State Rules of Procedure to Bar Federal Habeas Corpus Review

Petitioner seeks to create what it terms the "pre-emption formulation" of procedural default doctrine. Under its view of the law, all state procedural grounds for decision would be deemed "adequate" in habeas corpus cases without any analysis unless the application of the state rule constituted an independent violation of federal law.

This is a misguided view of the law that seeks to set aside the myriad decisions of this Court upholding the independent and adequate state ground doctrine. See e.g., Ford v. Georgia, 498 U.S. 411 (1991); Dugger v. Adams, 489 U.S. 401 (1989); Harris v. Reed, 489 U.S. 255 (1989); Johnson v. Mississippi, 486 U.S. 578 (1988); Hathorn v. Lovorn, 457 U.S. 255 (1982); County Court of Ulster County

v. Allen, 442 U.S. 140 (1979); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). "State grounds may be found inadequate without descending to a denial of due process." 16 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction § 4025 (1977).

Petitioner's formulation would also conflate the separate requirements of adequacy and independence. "[S]tate procedure can never be independent of the requirements of due process. There would be . . . jurisdiction to review a state decision that refused consideration of any claim, state or federal, on procedural grounds that fell below due process requirements." Id.

The State has identified no reason that the requirement of an "adequate" state ground for decision should be eliminated from habeas corpus cases. The governing principles of comity and federalism are the same in both instances. See Wainwright v. Sykes, 433 U.S. 72 (1977). This Court traditionally has rebuffed attempts to apply the independent and adequate state ground doctrine more deferentially in habeas corpus proceedings than on direct review, see Harris v. Reed, supra, 489 U.S. at 255, for the very sound reason that the doctrine, as applied in habeas corpus proceedings, is non-jurisdictional. Coleman v. Thompson, supra, 501 U.S. at 730-31.

Nothing in the doctrines of comity or federalism permits the barring of federal habeas corpus review by the application of arbitrary, haphazard, or otherwise "inadequate" state court grounds for decision. This Court should reject petitioner's attempt to rewrite the rules of federal procedure to do just that.

CONCLUSION

For the foregoing reasons, respondent Anthony Cornell Bean respectfully requests that this Petition for Writ of Certiorari be denied.

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Respectfully submitted,

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